IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH
AT JAIPUR

D.B. CIVIL WRIT PETITION NO.9354/2006
(Shyokaran & Ors. V/s. State of Raj & Ors.)

WITH

D.B. CIVIL WRIT PETITION NO.1820/2007
(Rajesh Panwar V/s. State of Raj & Ors.)

WITH

D.B. CIVIL WRIT PETITION NO.1821/2007
(Mango Singh V/s. State of Raj & Ors.)

WITH

D.B. CIVIL WRIT PETITION NO.1864/2007
(Mohan Singh V/s. State of Raj & Ors.)

WITH

D.B. CIVIL WRIT PETITION NO.2054/2007
(Nathu Ram & Anr. V/s. State of Raj & Ors.)

WITH

D.B. CIVIL WRIT PETITION NO.2055/2007
(Sagar Mal & Anr. V/s. State of Raj & Ors.)

WITH

D.B. CIVIL WRIT PETITION NO.2056/2007
(Asha Ram & Anr. V/s. State of Raj & Ors.)

WITH

D.B. CIVIL WRIT PETITION NO.4061/2007
(Baldeo Krishan Kalra V/s. State of Raj & Ors.)

WITH

D.B. CIVIL WRIT PETITION NO.2623/2007
(Rais Mhd. V/s. State of Raj & Anr.)

WITH

D.B. CIVIL WRIT PETITION NO.4690/2007
(Jagdish Singh V/s. State of Raj & Ors.)

Reportable

Date of Judgment :: 29-11-07

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR.JUSTICE R.S. CHAUHAN

Mr. R.S. Aggarwal)
Mr. Anshuman Saxsena)
Mr. Sumer Singh) for the petitioners.
Mr. G.S. Gill, Addl. Advocate General for the respondent.

(Per Hon'ble R.S. Chauhan, J.)

Like autumn leaves about to be scattered by gust of wind, the petitioners, who are convicted prisoners undergoing their sentences at Central Jail, Jaipur are about to be blown away to Central Jail, Bikaner by the respondents. Since, the petitioners are aggrieved by their proposed transfers from Central Jail, Jaipur to Central

Jail, Bikaner, they have sought the refuge of this Court under the writ jurisdiction. Since the grievances are common in all these petitions, they are being decided by this judgment.

Obviously, the petitioners have different backgrounds with regard to their criminal cases, which have landed them in the Central Jail, Jaipur. But, the factual matrix of their criminal cases are neither relevant, nor pertinent for the just decision of this case. What is essential to note is that the petitioners' share a common denominator : they are convicted under Section 302 and have been sentenced to life imprisonment. They are undergoing their sentences at Central Jail, Jaipur for the last so many years. They are permanent residents of either Jaipur, or Jaipur District, or of places nearby Jaipur District. During their incarcerations, they have regularly interacted with their kith and kin. During this interim period, they have reformed themselves to a great extent.

But, vide letter No.29550 dated 9.11.2006, the Director General of Prisons demanded a list of convicted prisoners, who were housed in the Central Jail, Jaipur for the purpose of transferring them to the Central Jail, Bikaner. In compliance with this letter, the Superintendent, Central Jail, Jaipur has sent a list of one hundred seventy-five convicted prisoners for the proposed transfer. Since, the petitioners are aggrieved by their proposed transfers, they have approached this Court.

In a chorus, the learned counsels for the petitioners have contended that the proposed transfer is in violation of Art. 14 of the Constitution of India. For, although Section 8 of the Rajasthan Prisoners Act, 1960 ('the Act', for short) permits the State Government to remove a prisoner and Rule 153 of Section V of the Rajasthan Prisoners Rule, 1951 ('the Rules', for short) also empowers the Inspector General of Prison, but the

prisoners are being transferred in an arbitrary manner. Secondly, the prisoners are being transferred on the basis of “seniority” i.e., on the basis of number of years, a prisoner has undergone his sentence at Central Jail, Jaipur. But, this criteria is absolutely arbitrary as it ignores various critical factors, such as the economic background of the family, the distance family would have to travel to meet the prisoner, the economic condition of the prisoner, the conduct of the prisoner in the Jail etc. Thirdly, the prisoners have a Fundamental Right to interact with their kith and kin under Art. 21 of the Constitution of India. The petitioners are poor and illiterate, who come from the rural areas nearby Jaipur or from the surrounding districts. In case, they were transferred to Central Jail, Bikaner, which is about four hundred kilometres away, the ties of the prisoners with their families would be snapped. Thus, their Fundamental Right to interact with their friends and families would be violated.

On the other hand Mr. G.S. Gill, the learned Additional Advocate General, has strenuously argued that the Central Jail, Jaipur is suffering from over-crowding, which is leading to a law and order problem within the Central Jail. In order to release the pressure of over-crowding, the respondents, in their wisdom, have decided to transfer the prisoners on the basis of seniority from Central Jail, Jaipur to Central Jail, Bikaner. According to learned Counsel, the provisions of Section 8 of the Act and Rule 153 of the Rules is being strictly followed. Since, the relevant law is being adhered too, the question of violation of Arts. 14 and 21 of the Constitution of India does not even arise.

In Rejoinder, the counsels for the petitioners have argued that Central Jail, Jaipur has a large campus comprising of almost twenty-two bighas of land. Most of the land is still lying

vacant. Although five new barracks were constructed by Government few years back, but all of them are not being used for housing the convicted prisoners. Therefore, according to them sufficient space does exist for housing the convicted prisoners and for solving the problem of over-crowding. Moreover, according to to the learned counsels, the law also provides other methods for reducing the problem of over-crowding in the jail, such as, grant of regular paroles and grant of permanent paroles to the convicted prisoners. Instead of constructing new barracks, or of exploring other legal means of reducing the problem of over-crowding, the petitioners are being transferred in an arbitrary manner.

Vide order dated 24.7.2007, this Court had directed the respondents to place on record the transfer policy adopted by the Government in transferring the prisoners to various jails of Rajasthan. In compliance of the said order, the

Director General (Prison) had written a letter, dated 30.07.2007, to the Superintendent, Central Jail wherein he had briefly mentioned the relevant provisions of law and had directed the Superintendent, Central Jail, Jaipur to bring the same to the notice of this Court. Consequently, in the report submitted by the respondents, the relevant provisions have been produced for the perusal of this Court. We shall deal with these relevant provisions at the pertinent portion of this judgment.

The prisons in India are infested with debilitating problems is an open secret. For the last sixty years of our republic, both the State and the Central Government have constituted various Commissions/Committees to examine the problems besetting the jails and to suggest remedies for solving these problems. But the Gordianknot is yet to be cut. Like the proverbial riddle of the sphinx, the problems of the jails are yet to be

solved. Ignored by the society, overlooked by the Government, the jails have metamorphosisized into hell as described by Dante in his book, **The Inferno**. Although over the past sixty years, the Hon'ble Supreme Court has expounded the Fundamental Rights of the convicted prisoners, has repeatedly directed radical reforms in the jails. but the “binding judgments” have been lost like voices in the wilderness. Thus, the conditions in our jails continue to be dehumanizing, continue to be sordid, and continue to be hellish.

Before one can deal with reformation of the jail, the law-makers, the law-enforcerors and the judiciary need to debate and discuss the philosophy behind incarcerating a prisoner.

Over the centuries, various theories of punishments have emerged : from the primeval theory of retribution, to the medieval theory of deterrence, to the modern theory of reformation.

The legal issue is, under the constitutional mandate what is the purpose of punishment? But before this issue can be answered one must deal with the issue “what is crime?” For, crime and theories of punishment are interlinked. The conventional view is that “crime is an offence against the State, while in contrast a tort in violation of civil law, is an offence against an individual”. Crime is, thus, a conduct which causes a harm to the interest of society; it is the harm which is legally forbidden and is proscribed by penal law. Broadly, it consists of twin aspects, the actual commission of the act forbidden by law and such a commission propelled by intention or knowledge or mens rea.

Societies have deferred in their attitude towards the criminals. Initially criminal acts were seen more as an extension of civil wrong. Therefore, instead of subjecting the criminal to a corporal punishment, the criminal was expected to

pay certain amount of fine either to the victim or to his family. Thus, criminal was asked to pay damages for his offending act. Subsequently, when the retributive theory of punishment emerged, the theory was succinctly summarized in the Old Testament by the saying “an eye for an eye, a tooth for a tooth”. The theory permits the victim or his family to inflict the Corporal punishment by depriving the criminal of his limbs. Such a retributive theory is still prevalent in Islamic law. However, when the society became more sensitive to the nature of the crime and less sensitive to the existence of the criminal, the deterrent theory of punishment came to the forefront. According to this theory, the criminal “justly deserves” the harsh punishment for his criminal act. Since the criminal act is an onslaught on the stability and the harmony of the society, it was thought best to inflict the most deterrent punishment on the criminal so as to set an example for others. It is these theories that

justify the existence of public execution in Islamic countries, the existence of capital punishment in democratic ones. Even an enlightened and modern country like the United States of America has reverted back to the deterrent theory of punishment as is evident from its sentencing policy.

However, with the revolutionary revelations of Sigmund Freud and with the growth of psychology in the 19th Century, the reformative theory of punishment emerged. If animals could be re-conditioned, it was felt that human behaviour, too, can be transformed through proper re-conditioning. In the 19th Century, penology underwent a change when the focus shifted from the nature of crime to the nature of the criminal. Suddenly, it was felt that people are not born as criminal, but become criminal because of the social conditioning. Therefore, like any other organism, the criminal, too, could be transformed by changing

the conditioning. According to the reformative theory, the purpose of imprisonment is not to lock up the criminal and forget about him. But the purpose is to transform him from the anti-social to a social, from a law-breaking to law-abiding, from an unruly to a disciplined member of the society.

The reformative theory of punishment is reflected both in the Constitution of India and in the International Conventions dealing with human rights. Art. 21 dealing with “life” and “personal liberty” guarantees a life of dignity and certainly a life above mere animal existence. Despite the fact that incarceration denudes some of the fundamental rights of the prisoner, but incarceration does not destroy all of his Fundamental Rights as guaranteed under the Constitution.

Mr. Justice White of United States of America has aptly stated *“ But though his rights*

may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections, when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."

Mr. Justice Douglas has observed *" Every prisoner's liberty is, of course, circumscribed by the very fact of his confinement, but his interest in the limited liberty left to him is then only the more substantial. Conviction of a crime does not render one a non-person whose rights are subject to the whim of the prison administration, and therefore, the imposition of any serious punishment within the prison system requires procedural safeguards."*

Similar judicial thinking has also been expressed by the Hon'ble Supreme Court in D.B.Patnaik V/s. State of Andhra Pradesh (1975 Cri

LJ 556) :

> *"Convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. A compulsion under the authority of law, following upon a conviction, to live in a prison-house entails by its own force the deprivation of fundamental freedoms like the right to move freely throughout the territory of India or the right to "practise" a profession. A man of profession would thus stand stripped of his right to hold consultations while serving out his sentence. But the Constitution guarantees other freedoms like the right to acquire, hold and dispose of property for the exercise of which incarceration can be no impediment. Likewise, even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or liberty except according to procedure established by law."*

In the case of Francis Coralie Mullin V/s.

The Administrator, Union Territory of Delhi & Ors. (AIR 1981 SC 746), the Hon'ble Court has observed as under :

> *"The right to life enshrined in Art. 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. The right to life includes the right to live with human dignity an all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human being.*
>
> *Thus, as part of the right to live with human dignity and therefore as a necessary component of the right to life, the prisoner or detenu would be entitled to have interviews with the members of his family and friends and no prison regulation or procedure laid down by prison regulation regulating the right to*

have interviews with the members of the family and friends can be upheld as constitutionally valid under Articles 14 and 21, unless it is reasonable, fair and just.

The same consequence would follow even if this problem is considered from the point of view of the right to personal liberty enshrined in Article 21, for the right to have interviews with members of the family and friends is clearly part that Article. The expression "personal liberty" occurring in Article 21 is of the widest amplitude and it includes the right to socialise with members of the family and friends subject, of course, to any valid prison regulations and under Articles 14 and 21, such prison regulations must be reasonable and non-arbitrary. If any prison regulation or procedure laid down by it regulating the right to have interviews with members of the family and friends is arbitrary or unreasonable, it would be liable to be struck down as invalid as being violative of Arts. 14 and 21."

Therefore, the issue before this Court is whether the policy of transferring the convicted prisoners on the basis of “seniority” is a reasonable, fair and just policy or not? Or such a criteria is in violation of Articles 14 and 21 of the Constitution of India?

Section 8 of the permits the State Government to remove the prisoner. Section 8 of the Act is as under :

> ***“Remove of Prisoners.*** *(1) The State Government may, by general or special order provide for the removal of any prisoner confined in a prison -*
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> *(a) under sentence of death, or*
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> *(b) under, or in lieu of, a sentence of imprisonment, or*
>
> *(c) in default of payment of a fine, or*
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> *(d) in fault of giving security for*

keeping the peace or for maintaining good behaviour, or

(e) otherwise.

to any other prison in the State.

(2)Subject to the orders and under the control of the State Government, any person who is detained in custody in a prison pending inquiry or trial or otherwise under any writ, warrant or order may, by order, be directed to be removed -

(a) from one subsidiary jail to another subsidiary jail within a district, by the Collector of the district.

(b) from one subsidiary jail to another subsidiary jail within a sub-division, by the Sub-divisional Officer,

(c) from a subsidiary jail in one district to a subsidiary jail in another district, by the Collector of the district from which the person is removed

with the consent of the Collector of the other district, and

(d) by the Inspector-General of Prisons -

(i) from one Central Jail to another Central Jail or to a District Jail or a subsidiary Jail, or

(ii) from one District Jail to another District Jail or a Central Jail or a subsidiary jail, or

(iii) from one subsidiary jail to another subsidiary jail or to a District Jail or a Central Jail."

Section V of Rajasthan Prisons Rules, 1951 deals with the transfer of prisoners and is as under :-

"**153. *Transfer of prisoners under I.G.'s orders.*** *- The following transfer can be made, subject to the orders or the Inspector-General of prisons:-*

(a) Transfer of prisoners of their

health;

(b) Transfer of prisoners to relieve overcrowding;

(c) Transfer of prisoners, to act as convict-officers, sweepers, cooks, etc. in another jail;

(d) Transfer of prisoners to teach any special trade;

(e) Transfer of "A" and "B" class prisoners;

(f) Transfer of other prisoners for any special reason."

Rules 154 is as under :

"154. Transfer of certain prisoners not to be made. *- No prisoner who is incapable of ordinary hard labour from age, sickness or infirmity or who has been sentenced to a simple imprisonment shall be recommended for transfer unless under special circumstances."*

Rules 155 is as under :

> *“**155. Transfer of prisoners from one jail to another on account of infectious disease –** No transfers shall be made from one jail to another when cholera or other infectious disease if prevailing in either jail or on the line of road along which the prisoners have to march.”*

Rule 156 is as under :

> *“**156. Transfer of prisoners by Superintendents of Jails in anticipation of I.G.'s sanction.** - For all transfers other than those under part IX of the Prisoners Act, a roll in the prescribed form shall be used. Transfer under paragraph 153, clause (c) can be made by Superintendent of jails in anticipation of sanction when considered urgent after ascertaining that accommodation is available in the jail to which it is proposed to transfer the prisoners. Transfers under clause (d) can be made by Superintendents from time to time as required. In the case of a transfer from one jail to another the roll must be*

transferred who should, in returning it to the transferring jail, record therein whether accommodation is available. The roll should finally be sent to the I.G. Prisons for information and return to the transferring jail."

Rules 157 is as under :

*"**157. Transfer to another jail of prisoners or notorious jail breakers or violent characters. -** If notorious jail breakers or other violent characters are imprisoned in a district or subsidiary jail, or if any jail officer or servant be imprisoned for a period of over one month, of if any near relative of any jail officer, or any person of great local influence be imprisoned, information should at once be given to the Inspector- General with a view to the transfer of such prisoner."*

Rules 158 is as under :

*"**158. Transfer of prisoners belonging to other provinces. -** As a general*

rule, members of criminal tribes and police registered criminals, not being natives of Rajasthan in which they are undergoing sentence shall be removed at any time not exceeding two months prior to their release either to the prison of the district to which they belong or to the prison nearest their native place or to the jail so appointed by the Government of Rajasthan. The Inspector-General of Prisons is authorised under Section 29(1) of the Prisons Act, 1900 (III of 1900) and the Government of India (Adaptation of Indian Laws) Order, 1937, to order the removal of such prisoner as required above and will pass a formal order sanctioning the transfer, and will at the same time give notice in each case to the Inspector-General of Prisons of the province to which the prisoner is removed."

Rules 159 is as under :

*"**159.** Any prisoner, whose detention in a prison of the State in which he undergoing sentence is deemed*

inexpedient may be removed with the previous consent of the Inspector-General of Prisons of the State which it is proposed to remove him."

Rule 166 is as under :

*"**166. Transfer of prisoners of different classes at different times.** **(1)** Prisoners of different classes should, if it can be so arranged, be transferred at different time; when different classes are transferred at the same time, they shall be so far as may be practicable, kept apart from each other, and no prisoner of one class shall be attached to a prisoner of another class.*

(2) Every military prisoner, A and B class prisoner, civil prisoner if insane, violent or dangerous, and all parties of prisoners and guards when, inclusive of guards, the party exceeds three in number, shall be despatched in reserved compartments.

(3) With the exceptions in clause (2) every party of guards and prisoners when

the number of persons (guard) included does not exceed three, shall travel in ordinary carriages.

(4) "A" class prisoners and military insanes shall be conveyed in second class, "B" class prisoners & special class under-trials in inter-mediate class and "C" class prisoners in third carriages. "A" and "B" class male prisoners and all female prisoners will ordinarily be given a conveyance for the journey between the railway station and the jail.

Note. If intermediate class accommodation is not provided by railways on any train running on the route or part of the route by which "B" class convicted prisoners and special class under-trail prisoners have to be sent, these classes of prisoners may be conveyed in second class on that route or on the part of that route."

A bare perusal of these provisions clearly reveal that the State Government has, thus, power

to remove a prisoner, who is undergoing sentence of death or a sentence of imprisonment or an imprisonment in lieu of default of fine or in default of giving security for keeping the peace or for maintaining good behaviour or otherwise.

Rule 153 prescribes the reasons for which the prisoners can be transferred i.e., on account of their health, for relieving overcrowding in the prisons, to act as convict-officers, sweepers, cooks, etc., in another jail, for permitting the prisoners to teach any special trade, for transferring “A” and “B” class prisoners and lastly “for any other reason”. Rule 157 further permits the transfer of prisoners on the ground of their notorious act of jail breaking, or persons of violent character, or if the prisoner happens to be the relative of a jail officer, or a relative of any person of great local influence. Rule 158 further empowers the Inspector-General of Prisons to transfer the prisoner belonging to the criminal

tribes and police registered criminal who are from outside Rajasthan.

Although the reasons for transferring the prisoners have been delineated in the Rules of 1951, the basis for transferring has not been laid down. In the present case, according to the respondents, the transfers are being made from Central Jail, Jaipur to Central Jail, Bikaner in order to release overcrowding in Central Jail, Jaipur. According to them, their action of transferring the petitioners is thus, covered by Rule 153(B) of the Rules of 1951. Further, according to them, transfers are being made on the basis of seniority i.e., the number of years of total sentence which has been spent by the prisoner in Central Jail, Jaipur. However, seniority cannot form a valid basis for such transfer. For, before a prisoner can be transferred, various factors should be considered such as the age, the health, the utility of the prisoner within the jail. Secondly,

the economic condition and the social status of his family. Thirdly, the distance, his family would have to travel in order to interact with the prisoner. Fourthly, the age of the family members would also be a relevant factor. Since most of the prisoners come from the rural areas and the people of rural areas are poor and illiterate, their economic condition is also a vital criteria to be considered before transferring a prisoner from one jail to another jail. Thus, solely seniority is not a valid yardstick.

Not only does a prisoner have a Fundamental Right under Art. 21 of the Constitution of India to meet his family members, but such a meeting is also therapeutic in nature. The constant interaction with family not only keeps the prisoner involved with family affairs, with their sorrow and happiness, but also motivates him to reform himself so that he can go-back to his own family. Moreover, since the family members play a vital role in

reforming the prisoner, humane approach needs to be adopted. Therefore, each case of transfer has to be examined individually. After all, the above factors will differ from prisoner to prisoner.

In an era of human rights and under the aura of constitutional mandates, the prison cannot be converted into human zoo where human beings are being shackled, locked up and forgotten. They cannot be treated as animals, only to be fed and be kept alive at the minimum sustenance level. Both the constitutional spirit and reformative theory teach us to permit the prisoners to live with human dignity. The jail administration has to be alive to the fact that they have a pious constitutional duty towards the prisoners. Therefore, the respondents should be weary of violating the Fundamental Rights of the prisoners. Hence, the carte blanche criteria of applying seniority for transferring the prisoners is legally unsustainable.

In the result, these petitions are allowed and it is directed that the petitioners are not to be transferred from the Central Jail, Jaipur till the cases of prisoners are individually examined in the light of the criteria mentioned above.

As a footnote, we would also like to add that considering the fact that the Central Jail, Jaipur has a large chunk of land which is lying vacant, the Government should consider the prospect of constructing more barracks and accommodating the prisoners so that a large number of prisoners can easily be accommodated in the Central Jail, Jaipur.

[R.S.CHAUHAN]J. **(SHIV KUMAR SHARMA) J.**

A.Asopa/